

EXHIBIT A

1 IN THE UNITED STATES DISTRICT COURT
2 DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

Case 4:20-cv-04192-LLP

4 DAKOTA ENERGY COOPERATIVE, INC.,
5 Plaintiff/
6 Counter-Claim Defendant,
7 v.
8 EAST RIVER ELECTRIC POWER
9 COOPERATIVE, INC.,
10 Defendant/
Counter-Claim Plaintiff/
Cross-Claim Defendant,
11 and
12 BASIN ELECTRIC POWER COOPERATIVE,
13 Intervenor-Defendant/
Counter-Claim Plaintiff/
14 Cross-Claim Plaintiff.

15

16 VIDEOCONFERENCE

17

DEPOSITION

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C

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DAVID RAATZ,

20

on behalf of BASIN ELECTRIC POWER COOPERATIVE

21

September 23, 2021

22

9:12 a.m.

23

LOCATION:

24

All parties appearing via Zoom.

25

REPORTER: CAROLYN TAYLOR PEKAS, RPR

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1	Energy's request to withdraw from East River?	1	Q. What is this document?
2	MR. ORR: Object to form.	2	A. It's the -- a board resolution outlining --
3	MR. DIRENFELD: Same objection.	3	where the board indicates the board has considered
4	A. I'd have to go back in to review the	4	the request of a Class A member and the advice of
5	resolutions.	5	counsel and concluded that it is not in the best
6	Q. (BY MR. JASILLI) Is there any board	6	interests of the cooperative or the membership to
7	resolution that Basin contends governs East River's	7	allow any buyout of the all-requirements contracts
8	response to Dakota Energy's request to buy out of its	8	with the cooperative or any of the Class A members.
9	wholesale power contract with East River?	9	Q. Is it Basin's position that this board
10	MR. DIRENFELD: Object to form.	10	resolution creates any obligations for its Class A
11	MR. ORR: Object to form.	11	members?
12	A. I believe there are -- there's at least one	12	MR. DIRENFELD: Object to form.
13	board resolution that pertains to a member exiting	13	A. I think this resolution, as it states in the
14	and -- you know, from membership, and providing	14	third whereas clause of the resolution, where it
15	buyout numbers.	15	indicates, basically, the all-requirements contracts
16	Q. (BY MR. JASILLI) Have you ever seen that	16	between both the Class A members of the cooperative
17	resolution?	17	and the Class C members of the Class A members do not
18	A. Yes, I have.	18	contain any provisions permitting the member to buy
19	Q. When did you see it?	19	out of the all-requirements contract, that the
20	A. When it was being developed and in	20	cooperative or the Class A member is applicable.
21	preparation for discussions today.	21	Q. (BY MR. JASILLI) So is this resolution
22	Q. Do you recall any specifics about that	22	directing Class A members not to allow buyouts of the
23	resolution?	23	all-requirements contracts?
24	MR. DIRENFELD: And I'm just going to -- on	24	A. I think it's reflecting the terms of the
25	this note, referring to the, at least, portion where	25	existing contracts and a reiteration of what those
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1	he talks -- Dave was referring to the development of	1	terms are.
2	the resolution, I'll counsel him not to reveal any	2	Q. So this is Basin telling its Class A members
3	conversations with legal counsel or conversations	3	what their wholesale power contracts mean with their
4	that may have occurred in executive session of the	4	Class C members; right?
5	board with legal counsel.	5	A. Basin's interpretation of what those
6	A. So the resolution basically said with the	6	contracts say.
7	advice of legal counsel, the board did not feel it's	7	Q. And Basin is telling its Class A members
8	appropriate to provide a buyout number, in essence.	8	that their wholesale power contracts do not allow
9	Q. (BY MR. JASILLI) Is it Basin's position	9	buyouts; is that right?
10	that that resolution is binding on East River?	10	MR. DIRENFELD: Object to form.
11	MR. DIRENFELD: Object to form.	11	A. I think it's laying out what Basin's
12	MR. ORR: Object to form.	12	interpretation is, and it's providing that
13	A. I believe that resolution is referencing	13	interpretation to its members, where they have
14	what the board believes is an appropriate	14	directed the CEO to furnish a copy of the resolution
15	interpretation of some of the all-requirements	15	to the Class A members of the cooperative who are
16	arrangements between the parties.	16	making the statement that this is our interpretation.
17	Q. (BY MR. JASILLI) Can you go to Tab 14,	17	Q. (BY MR. JASILLI) And Basin's interpretation
18	please?	18	of the Class A members' wholesale power contracts is
19	MR. JASILLI: And I'm going to mark this as	19	that they do not allow buyouts; right?
20	Exhibit 3.	20	A. Uh-huh.
21	(Deposition Exhibit Number 3 marked for	21	Q. Is that --
22	identification.)	22	A. Yes, that's what it says.
23	Q. (BY MR. JASILLI) Mr. Raatz, do you	23	Q. And is Basin directing its Class A members
24	recognize this document?	24	to follow Basin's interpretation of those contracts?
25	A. Yes, I do.	25	MR. DIRENFELD: Object to form.

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1	talking objections, please.	1	the advice of counsel into the resolution. The
2	MR. DIRENFELD: Yeah. I'm instructing the	2	resolution speaks for itself.
3	witness not to answer, so we'll move on. I've made	3	I'll also note that the witness was not
4	an instruction.	4	designated and we objected to talking about the
5	Q. (BY MR. JASILLI) So is there any factual	5	interpretation of the agreements. The witness gave
6	basis for the interpretation that isn't privileged?	6	you the factual basis, and we've objected and made an
7	MR. DIRENFELD: I don't quite understand	7	instruction on privilege, and we can now move on.
8	what you mean by "factual basis."	8	Q. (BY MR. JASILLI) In the next whereas, it
9	Q. (BY MR. JASILLI) Is there a factual basis	9	says, "As a result, neither the cooperative nor any
10	for the interpretation that East -- of the wholesale	10	Class A member has any obligation to develop,
11	power contracts that East River put in this	11	calculate, or furnish any information required in
12	resolution?	12	connection with the buyout or otherwise permit any
13	A. The factual basis is the words of the	13	such member to buy out of its all-requirements
14	all-requirements contract, the words of the bylaws.	14	contract." Do you see that?
15	That's the factual information, the contracts and the	15	A. Yes, I do.
16	bylaws.	16	Q. What is Basin's basis for that statement?
17	Q. So what Basin did here was take its	17	MR. DIRENFELD: Again, the witness can speak
18	counsel's interpretation of those words and put them	18	to any factual basis, but do not -- do not -- do not
19	in this resolution; right?	19	reveal any privileged communications.
20	MR. DIRENFELD: Objection. I'm going to	20	A. I guess it's the -- Basin's opinion that the
21	instruct the witness not to answer because you --	21	all-requirements contract be read in conjunction with
22	based on privileged communications.	22	the bylaws does not provide -- or has provisions for
23	MR. JASILLI: Mr. Direnfeld, if Basin put	23	the withdrawal of membership, and you -- it's the
24	the advice of its counsel directly in a resolution	24	board's interpretation or opinion that that cannot
25	that it admits it expected to be widely distributed	25	be -- a termination of the all-requirements contract
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1	amongst its membership, that advice is not	1	is not provided for until the expiration of its
2	privileged. They have waived that privilege.	2	contract.
3	MR. DIRENFELD: We have not waived that	3	Q. (BY MR. JASILLI) When you said that it's
4	privilege. I'm instructing the witness not to	4	the board's opinion, who specifically on the board
5	answer. Move on.	5	came up with that opinion?
6	MR. JASILLI: You're instructing the witness	6	A. It's the board in its whole. It's the
7	not to answer if the statement in this resolution is	7	board's opinion, the board's resolution.
8	the advice of its counsel?	8	Q. And how did the board reach that opinion as
9	MR. DIRENFELD: Yes.	9	a whole?
10	MR. JASILLI: If the statement is the advice	10	MR. DIRENFELD: Objection. I'll instruct
11	of counsel, then the privilege was waived. You have	11	the witness not to answer to the extent it reveals
12	to let your witness answer whether or not this	12	any privileged communications with counsel.
13	statement is the advice of counsel.	13	A. Again, it was discussed in executive session
14	MR. DIRENFELD: I do not have to. I'm	14	and under attorney-client privilege.
15	instructing him. We can move on. I've made my	15	Q. (BY MR. JASILLI) Did the board adopt the
16	instruction.	16	opinion or the advice of its counsel?
17	MR. JASILLI: All right. Well, I'm going to	17	MR. DIRENFELD: Objection. Again, I'm going
18	reserve on that topic as I have said the record	18	to instruct the witness not to answer -- to reveal
19	indicates that Basin placed the advice of counsel	19	attorney-client privilege of conversations that
20	directly into this resolution, and it is Dakota	20	occurred with attorneys in executive session. The
21	Energy's position that it would like to reserve the	21	resolution speaks for itself.
22	ability to raise that waiver of privilege with the	22	Q. (BY MR. JASILLI) I'm just going to ask you
23	Court at a later time.	23	point-blank, Mr. Raatz: Is this resolution -- are
24	MR. DIRENFELD: Yeah, and I will state for	24	the words in this resolution the advice of Basin's
25	the record that the witness did not say that he put	25	counsel?

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1	MR. DIRENFELD: Objection. I'm going to	1	communications, which were privileged, occurred in
2	instruct the witness not to answer again,	2	the context of a joint defense agreement, that joint
3	Mr. Jasilli. Same -- same instruction. You're	3	defense agreement protects those privileges, and the
4	trying to get into privileged conversations.	4	witness should not testify about those
5	MR. JASILLI: I'm going to make the same	5	communications.
6	reservation that I made previously, which is that if	6	MR. DIRENFELD: I echo Mr. Orr's statement
7	Basin placed the advice of its counsel directly into	7	there.
8	a document that it then shared with all of its	8	A. Those discussions did happen with legal
9	Class A members and presumed would be shared with all	9	counsel present.
10	of its Class C members, then the privilege is waived.	10	Q. (BY MR. JASILLI) Which legal counsel?
11	MR. DIRENFELD: We disagree --	11	MR. DIRENFELD: I'm going to -- at this
12	MR. JASILLI: We reserve the right to raise	12	point, now, I will object and instruct the witness
13	that issue with the Court.	13	not to answer. The witness has stated that they've
14	MR. DIRENFELD: We disagree with that	14	taken place pursuant to joint defense agreements.
15	position, and we're happy to go ahead and raise it	15	MR. JASILLI: You're instructing your
16	with the Court. You can move on.	16	witness not to answer which counsel were present
17	Q. (BY MR. JASILLI) So other than the words of	17	during the discussions?
18	the bylaws and the wholesale power contracts, is	18	MR. DIRENFELD: I will allow the witness to
19	there any basis for the opinions in this resolution	19	answer only to the extent of identifying which
20	other than advice of counsel?	20	counsel was present, similar to a privilege log.
21	A. All those issues were discussed in executive	21	So you may answer -- you may answer, Dave,
22	session and under attorney-client privilege.	22	who was present.
23	MR. DIRENFELD: I'll make my same	23	A. Bob Sahr and Mark Foss.
24	instruction.	24	Q. (BY MR. JASILLI) Was there any counsel
25	MR. JASILLI: And I'll make the same	25	present for any of the Class A members?
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1	reservation.	1	MR. ORR: Just a clarification. Bob Sahr is
2	MR. DIRENFELD: Yeah.	2	counsel for East River, which is a Class A member.
3	Q. (BY MR. JASILLI) Was the board's reasoning	3	A. I'm not aware of a general discussion with
4	for the opinions contained in this resolution ever	4	the entire membership. It was more one-on-one.
5	shared with Basin's Class A members?	5	Q. (BY MR. JASILLI) So which members did Basin
6	MR. DIRENFELD: Objection. I'll also --	6	have one-on-one conversations with?
7	objection to the extent that any -- any materials	7	MR. DIRENFELD: Objection. Again, beyond
8	were exchanged under joint defense agreements.	8	the scope of identifying who, I'm going to instruct
9	MR. ORR: Same objection.	9	the witness not to answer about any -- any details
10	A. I believe the -- the basis for the	10	the conversations covered under a joint defense
11	conclusions is in the all-requirements -- in the	11	agreement relating to privileged communications.
12	words of the all-requirements contract and the	12	THE WITNESS: So I'm supposed to answer the
13	bylaws, and I do believe there have been discussions	13	question?
14	with members on the words in those contracts.	14	MR. DIRENFELD: Dave, you can answer who.
15	Q. (BY MR. JASILLI) Did you ever discuss --	15	Do not reveal the contents of any conversations.
16	let me rephrase that.	16	THE WITNESS: Okay.
17	Did Basin ever discuss with any Class A	17	A. With East River and Upper Missouri
18	member the specific advice from its counsel regarding	18	specifically.
19	the meaning of those words in the bylaws and	19	Q. (BY MR. JASILLI) So Basin did not have
20	wholesale power contracts?	20	discussions about the underlying reasoning for the
21	MR. DIRENFELD: Same objection to the extent	21	opinions in the resolution with any of its members
22	that those conversations occurred pursuant to joint	22	other than Upper Missouri and East River?
23	defense agreements.	23	A. Not that I participated in.
24	MR. ORR: Yes, I'll concur in that	24	Q. What about conversations that you didn't
25	objection. To the extent any of those	25	participate in?

WHEREAS, one of the Cooperative's Class A Members has received requests from two of the Cooperative's Class C Members for a price for those Class C Members to buy out of their all-requirements contracts with the Class A Member;

WHEREAS, the Cooperative also has received a request from one of its Class A Members for the process and parameters to calculate a price if that Class A Member was to buy out of its all-requirements contract with the Cooperative;

WHEREAS, the Cooperative has been advised by both its General Counsel and its outside counsel, Orrick, Herrington & Sutcliffe LLP, that the all-requirements contracts of both the Class A Members with the Cooperative and the Class C Members with the Class A Members do not contain any provision permitting the member to buy-out of its all-requirements contract with the Cooperative or the Class A Member, as applicable;

WHEREAS, as a result, neither the Cooperative nor any Class A Member has any obligation to develop, calculate or furnish any information required in connection with a buy out or otherwise permit any such member to buy-out of its all-requirements contract; and

WHEREAS, the Board of Directors has considered the request of the Class A Member and the advice of counsel and concluded that it is not in the best interests of the Cooperative or its membership to allow any buy out of any all-requirements contracts with the Cooperative or any of its Class A Members;

NOW, THEREFORE, BE IT RESOLVED, that the General Manager and CEO is hereby authorized and directed to furnish a copy of this resolution to all Class A Members of the Cooperative.